BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 00-319, JOSEPH P. BAKER
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Supreme Court No.: SC00-2510

JUDGE BAKER'S ANSWER AND AFFIRMATIVE DEFENSES

Judge Joseph P. Baker, pursuant to Rule 9, Florida Rules of Judicial Qualifications Commission, hereby responds to the Notice of Formal Charges as follows:

1. Judge Baker admits that he was the presiding judge in the jury trial of *Universal Business Systems, Inc. v. Disney Vacation Club Management Corp.* ("UBS v. Disney"). He admits that he entered a ruling reducing the damages. He admits that prior to ruling he entered a Memorandum of Ruling disclosing his reasons for his ruling, which was consistent with his oral and written statements made during the trial on several occasions informing counsel for both parties of his reasons for disagreeing with plaintiff's legal theory of damages. Judge Baker admits the Fifth District Court of Appeal reversed his ruling, but this decision is not final as a petition for writ of certiorari from this decision is pending in the Florida Supreme Court.

2. The remaining allegations set forth in the Notice of Formal Charges are denied. In support and explanation of that denial Judge Baker alleges as follows:

(a) Judge Baker began conversations with computer consultants and computer experts and others knowledgeable about the internal workings of computer software and hardware over ten years before *UBS v. Disney* was filed as a lawsuit. All of these conversations contributed to Judge Baker's understanding of computers, especially computer programming, source codes and related issues of computers that came up in *UBS v. Disney*.

(b) For well over ten years prior to the trial of *UBS v. Disney*, Judge Baker had studied not only how to use computers, but also the fundamental technical aspects of how computers operate. In that regard, he has studied the binary number system, machine language, Boolean Algebra, algorithms, disk operating systems, computer programming, computer programming languages, compilers, interpreters, and some aspects of the hardware by which computers work.

(c) Judge Baker is not and does not claim to be an expert on computers or computer programming. He is very computer literate for his age. Judge Baker undertook on his own initiative to learn about computer operations to better

understand and use the computers that have pervaded the court system as well as virtually all other aspects of human activity. Judge Baker studied the fundamentals of computer operations for personal improvement as well as to be a better judge by better understanding litigation involving computers. This was done over more than ten years prior to the trial at issue.

(d) Much of Judge Baker's preparation for understanding computer workings, computer programming and computer languages came from his life-long interest in studying languages and methods of communication. The foundation for this was laid in schools, high school, college and graduate studies, especially in the logic of human languages, mathematics, mathematical logic, symbolic logic and truth tables, all of which he studied in college and graduate school.

(e) The conversations that began more than ten years before *UBS v. Disney* between Judge Baker and others regarding different aspects of computer operations and how they work were intermittent and have been with a variety of persons. Some of the persons with whom Judge Baker has had these conversations for over ten years prior to *UBS v. Disney* have been with the local court system which provides a staff of computer helpers, advisors and instructors. Sometimes Judge Baker has had

conversations with lawyers and witnesses in lawsuits prior to *UBS v. Disney* where different aspects of computers came up formally or informally. Judge Baker has also had conversations with others both inside and outside of the courthouse. These have been conversations with various persons whose identities and the details of the conversations Judge Baker does not specifically recall. Except for conversations with a few selected computer consultants and experts, none of those conversations with lawyers or others was held with *UBS v. Disney* in mind, nor was *UBS v. Disney* a subject of the conversation.

(f) Judge Baker also had intermittent but repeated conversations regarding computer workings and operations with several computer consultants and computer experts which have gone on for more than ten years before *UBS v. Disney* was filed. These select few computer consultants and computer experts with whom Judge Baker carried on intermittent conversations in which he was inquiring about and being informed about computers were relatives and very close personal friends who were knowledgeable about computers.

(g) It is impossible for Judge Baker to account for which part of his knowledge about computers he acquired from whom and when. All of the information

he had obtained from all sources had a bearing on his understanding of *UBS v. Disney.*

(h) At the time Judge Baker had conversations with the select few computer consultants and computer experts in which he explored his thoughts regarding *UBS v. Disney*, the computer consultants and computer experts were known well by Judge Baker to have no interest in *UBS v. Disney*, nor any stake in the outcome of that case. Judge Baker did not make his rulings in *UBS v. Disney* based on the advice of anyone. Judge Baker's rulings were his own decisions. Judge Baker did test his understandings of computer works and operations and explored different perspectives on the technical computer questions that came up during *UBS v. Disney* to be sure he was not overlooking something.

(i) Since *UBS v. Disney* was a jury trial, Judge Baker did not make any findings of fact. He did not call any witnesses or question any witnesses in order not to intrude on the role of the attorneys or function of the jury.

(j) Judge Baker repeatedly disclosed both verbally and in writing to counsel in open court during the trial of *UBS v. Disney* that he was doing extensive research on the issues involved in that case, primarily the issue of the measure of damages. A

large part of his research was done on the computer available to Judge Baker on the bench in the courtroom during the trial, and counsel were advised of the research Judge Baker was doing as he was doing it during the trial. Judge Baker's courtroom computer has an Internet connect which he used regularly for legal research and research on technical issues involved in *UBS v. Disney*, as he does in other cases.

(k) The primary legal issue was the measure of damages, and Judge Baker recognized the standard measure of damages in breach of contract cases for the sale or exchange of things is value of that which was to be delivered. Judge Baker decided and stated orally and in writing that this measure of damages should apply to *UBS. v. Disney*. Judge Baker was of this view very early in the case of *UBS v. Disney*. Judge Baker ruled that way on discovery issues before trial, and he was of the view that his predecessor judge in the case had ruled likewise. Judge Baker never found any reason to change his conclusion on the measure of damages.

(l) Adopting and applying the standard measure of damages, Judge Baker made very clear both verbally and in writing before trial and during trial that he did not believe the cost incurred by Disney in adopting, adapting, modifying the software

purchased from UBS or creating databases and using the software system as modified was a proper measure of damages for UBS on the alleged breach of contract.

(m) Judge Baker's position that the measure of damages being put forth by UBS relying on Disney's costs was unsound had been stated by Judge Baker to counsel prior to the commencement of the trial in *UBS v. Disney*. This had been done at rulings in which Judge Baker disallowed discovery by UBS into Disney costs related to this software.

(n) Judge Baker stated after opening statements in *UBS v. Disney* his disagreement with plaintiff's theory of damages. His position was restated in lengthy written drafts of his research that Judge Baker wrote on his computer and delivered to counsel during the trial in open court.

(o) It is denied that the Fifth District Court of Appeal made a finding that Judge Baker "improperly considered information gleaned from ex parte communications in [his] decision to override the jury's verdict," and strict proof of such a finding is demanded. It is denied the Fifth District Court of Appeal had jurisdiction to make any such finding. It is denied the Fifth District Court of Appeal

heard evidence on that matter or heard argument on that question. It is denied that Judge Baker had any notice of such a claim or opportunity to be heard.

(p) Judge Baker's Memorandum of Ruling speaks for itself. The summary thereof in the Notice of Formal Charges is not true, correct or complete and is therefore denied.

(q) Judge Baker's Memorandum of Ruling was filed prior to the entry of any order or final judgment. In this, as in other cases, Judge Baker wrote a Memorandum of Ruling and distributed it to counsel prior to entry of any final order or judgment to fully disclose his reasoning and give counsel every possible opportunity to disagree with his reasoning or provide opposing authority. No objection or dispute with the Memorandum of Ruling was made by anyone to Judge Baker. Judge Baker has a practice of entering and serving such memorandums of ruling prior to signing orders or judgments to display his reasoning and understandings of the case for the specific purpose of allowing counsel to point out any mistakes or errors on his part, and he heard nothing from counsel in this case.

(r) Judge Baker denies any ex parte communications with anyone regarding *UBS v. Disney*. In denying this, Judge Baker relies on the definition of "ex parte" in

Black's Law Dictionary and *The Oxford English Dictionary*, as well as the daily usage and practice in his court and every other court with which he is familiar.

(s) Judge Baker denies his conduct in *UBS v. Disney* is a basis for sanctions of any kind. To the contrary, he asserts this Judicial Qualifications Commission has adopted an extreme and unprecedented position advanced by some Florida trial lawyers. Any error made by Judge Baker was a good faith, honest mistake, one that is in the nature of judicial error, which can be corrected through the appellate process, and one that is only after-the-fact proposed to be a sanctionable offense, as more fully set forth in the Motion to Dismiss filed in this action, and the defenses set forth below.

Affirmative Defenses

First Affirmative Defense

The charges as alleged and prosecuted against Judge Baker are unprecedented, as set forth in detail in the Motion to Dismiss previously filed in this action. There is no authority in Florida, or in any jurisdiction known to the undersigned, that supports the charges in this proceeding and this Commission's interpretation of Canon 37 of the Florida Code of Judicial Conduct. Therefore, if Judge Baker is sanctioned in this case, it will be on the basis of new law, which law was not known (nor could it be known) to him before he took the action that is the subject of this claim. Such *ex post*

facto proceedings are improper, unwarranted and violate Florida law and the law of the United States.

Second Affirmative Defense

Any error by Judge Baker was made in good faith and on the basis of his knowledge of the law on Canon 3 of the Code of Judicial Conduct, and thus should not form the basis of sanctions against him. As set forth in the Motion to Dismiss, Judge Baker has stated that he has considered this rule and heard argument of counsel regarding it beginning more than ten years ago. He wrote letters over ten years ago to counsel regarding this Canon and the independence of a judge to do research and consult with experts on scientific and technological subjects involved in litigation. Judge Baker has researched this Canon several times since. Judge Baker's declared understanding of this rule after listening to argument and researching it is that it proscribes ex parte communications and any other communications intended to influence the judge's decision, and does not preclude a judge from reading materials or listening to informative comments, nor does it preclude discussing a pending or impending case with persons he knows to be knowledgeable on technical matters and wholly impartial, unconnected and unrelated to pending or impending cases, for the purpose of informing him or herself regarding a pending or impending case or testing his or her understanding of the case. Judge Baker has researched Canon 3(B)7 and

the corresponding language in the ABA Model Code of Judicial Conduct. He has found it supports his interpretation and understanding of Canon 3(B)7 with no authority to the contrary in any jurisdiction in the United States.

Third Affirmative Defense

Any error by Judge Baker was one of law that could and should be corrected through the judicial process. If these formal charges are held to be legally sufficient, it must be on the principle that parties or counsel may continue to pursue a trial judge's errors by instituting judicial discipline procedures even after those errors are found and corrected by a an appellate court. Thus, the formal charges in this case in effect ask the Judicial Qualifications Commission to become an additional and alternate appellate court, which is, of course, contrary to the constitutional and statutory law of Florida creating the Judicial Qualifications Commission, and beyond this Commission's jurisdictional powers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a copy of the foregoing has been furnished by U.S. Mail delivery to *Judge James Jorgenson*, Chairman, Hearing Panel, Florida JQC, Room 102, The Historic Capitol, Tallahassee, FL 32399-6000; *Thomas C. MacDonald, Jr., Esquire*, General Counsel to JQC, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; *Brooke S. Kennerly*, Executive Director, Florida Judicial

Qualifications Commission, 400 S. Monroe, Old Capitol, Room 102, Tallahassee, FL 32399; *John R. Baranek, Esquire*, Counsel to the Hearing Panel, P. O. Box 391, Tallahassee, FL 32302-0391; and *Charles P. Pillans III, Esquire,* The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202, this 5th day of February, 2001.

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